Tuan Hj Ishak bin Ismail v Leong Hup Holdings Bhd & other actions

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-218-95 CONSOLIDATED WITH CIVIL APPEAL NOS W-02-219-95, W-02-245-95, W-02-248-95, W-02-251-95 AND W-02-274-95
SITI NORMA YAAKOB, MAHADEV SHANKAR AND ABDUL MALEK AHMAD JJCA
25 SEPTEMBER 1996

Civil Procedure *— Costs — Getting-up fee — Appellants represented by separate set of solicitors — Appeal was allowed — Substantial submission in court below and on appeal made by counsel for one of the appellants — Submission adopted and supported by other appellants — Whether each appellant was entitled to separate getting-up fee — Appotionment of costs — Rules of the High Court 1980 O 59 Appendix 1*

The ten appellants' appeal in this case was allowed (see [1996] 1 MLJ 661). The determination herewith was with regard to costs. Each of the appellants applied to be paid a separate set of costs and further indicated to the court that each regarded itself entitled to a getting-up fee of at least RM100,000. Counsel for the respondent submitted that there should only be one getting-up fee to be shared by the appellants in such manner as the court may direct. Each appellants was represented by a separate set of solicitors although all of them were urging the same legal grounds for the relief sought. The notes of evidence showed that the substantial submissions were made for the respondents in the court below (the appellants in this court) by counsel for the first respondent (ie the first appellant on appeal). There was also some significant support from counsel for the second, third and fifth respondents, and somewhat less by counsel for the fourth respondent and the ninth respondent. The rest merely supported the submissions. On appeal, the substantial submission was made by counsel for the first appellant while the rest either adopted the former's submission or did not address the court at all. It was also clear that what was said after the first appellant completed its address was only a repetition of the same legal principles with different cadences. It was also shown that the preparation of the appeal record was entirely the work of the first appellant's solicitors.

Held:

Costs were always a matter of discretion (see r 96 of the Rules of the Court of Appeal 1994 ('the Rules')), and how a discretion was exercised must be governed by the facts of each case. In the circumstances of this case and only so far as this appeal was concerned, it was clear that the ends of justice would be best served by the court exercising its discretion to award a gross sum under O 59 Appendix 1, Pt IV item 27 in lieu of taxed costs for the item as follows:

(1) Appeal No 218-95 (by the first appellant) — RM100,000

(2) Appeal No 219-95 (by the second, third and fifth appellants) — RM40,000

(3) Appeal No 274–95 (by the fourth appellant) — RM25,000
(4) Appeal No 245–95 (by the sixth appellant) — RM10,000
(5) Appeal No 248–95 (by the seventh appellant) — RM10,000
(6) Appeal No 251–95 (by the eight and nine appellants) — RM25,000

The costs shall be paid to the appellants by the respondent in addition to any other costs they shall be entitled to for *other* work done in the appeal which shall be taxed in the usual manner.

As for the costs in the court below, all the costs shall be taxed and paid by respondent to each of the appellants. The appellants shall be entitled to present separate bills of costs for taxation but for costs covered under O 59 Appendix 1, Pt IV item 26, the registrar should have regard to what was decided on appeal in this judgment as a guide to how the getting-up fee and advocacy before the trial judge should be inter-related (see pp 627I and 628D–G).

[Bahasa Malaysia summary

Rayuan sepuluh perayu dalam kes ini telah dibenarkan (lihat [1996] 1 MLJ 661). Penentuan di sini adalah berkaitan dengan kos. Setiap perayu memohon supaya dibayar set kos berasingan dan selanjutnya memberitahu mahkamah bahawa masing-masing menganggap dirinya berhak kepada yuran penyediaan guaman berjumlah sekurang-kurangnya RM100,000. Peguam untuk penentang berhujah bahawa seharusnya terdapat satu yuran penyediaan guaman sahaja untuk dibahagikan oleh perayu-perayu dalam cara yang mungkin diarahkan oleh mahkamah. Setiap perayu diwakili oleh peguamcara berasingan walaupun kesemuanya mengemukakan alasan undang-undang yang sama untuk relief yang diminta. Nota keterangan menunjukkan bahawa hujah-hujah substantial dibuat untuk penentang-penentang di mahkamah bawah (perayu-perayu di mahkamah ini) oleh peguam untuk penentang pertama (iaitu perayu pertama atas rayuan). Terdapat juga beberapa sokongan penting dari peguam untuk penentang kedua, ketiga dan kelima, dan yang kurang penting oleh peguam untuk penentang keempat dan kesembilan. Yang lain hanya menyokong hujah-hujah. Atas rayuan, hujah substantial dibuat oleh peguam untuk perayu pertama sementara yang lain menerima-pakai hujah peguam penentang pertama atau tidak berucap kepada mahkamah sama sekali. Adalah juga jelas bahawa apa yang dikatakan selepas perayu pertama selesai berucap kepada mahkamah hanyalah ulangan prinsip undang-undang yang sama dengan nada berlainan. Ia juga ditunjukkan bahawa persediaan rekod rayuan adalah keseluruhannya kerja peguamcara perayu pertama.

Diputuskan:

Kos selalunya merupakan suatu perkara budi bicara (lihat k 96 Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah tersebut')), dan bagaimana budi bicara dilaksanakan mestilah dikuasai oleh fakta setiap kes. Dalam keadaan kes ini dan sejauh mana rayuan ini

berkaitan, adalah jelas bahawa keadilan akan tercapai sekiranya mahkamah melaksanakan budi bicaranya untuk mengawardkan jumlah kasar di bawah A 59 Lampiran 1, Bhg IV butir 27 sebagai mengganti kos yang dikenakan cukai untuk butir seperti berikut:

(1) Rayuan No 218–95 (oleh perayu pertama) — RM100,000

(2) Rayuan 219–95 (oleh perayu kedua, ketiga dan kelima) — RM40,000

(3) Rayuan No 274–95 (oleh perayu keempat) — RM25,000

(4) Rayuan No 245–95 (oleh perayu keenam) — RM10,000

(5) Rayuan No 248–95 (oleh perayu ketujuh) — RM10,000

(6) Rayuan No 251–95 (oleh perayu kelapan dan kesembilan) — RM25,000

Kos harus dibayar kepada perayu-perayu oleh penentang sebagai tambahan kepada mana-mana kos lain mereka berhak kepada untuk kerja *lain* yang dibuat dalam rayuan yang harus dikenakan cukai dalam cara biasa.

Berhubung dengan kos di mahkamah bawah, kesemua kos harus dikenakan cukai dan dibayar oleh penentang kepada setiap perayu. Perayu-perayu harus diberikan hak menyampaikan bil kos berasingan untuk cukai tetapi bagi kos yang diliputi di bawah A 59 Lampiran 1, Bhg IV butir 26, pendaftar harus mengambil kira apa yang ditentukan atas rayuan dalam penghakiman ini sebagai panduan bagaimana yuran penyediaan guaman dan kepeguaman di hadapan hakim perbicaraan harus saling berkaitan (lihat ms 627I dan 628D–G).]

Notes

For cases on costs, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 838–1088.

Cases referred to

Donald Campbell & Co Ltd v Pollak [1927] AC 732 (refd)
Lim Heng Hoo v Tan Hock Hai & Ors [1976] 2 MLJ 159 (refd)
Ritter v Godfrey [1920] 2 KB 47 (refd)

Legislation referred to

Companies Act 1965 s 181
Rules of the Court of Appeal 1994 rr 55, 96
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), O 59 r 9(4)

Appeal from: Originating Petition No D2–26–7 of 1995 (High Court, Kuala Lumpur)

RS Nathan (*Jeyaratnam & Chong*) for the first appellant.
YM Siew (*Raja Eleena Siew Ang & Tan*) for the second, third and fifth appellants.
Augustine Poh (*Cheong Kee Fong & Co*) for the fourth appellant.

P Gananathan (*Teh & Associates*) for the sixth and seventh appellants. A
Isa Aziz Ibrahim (*Ghazi & Lim*) for the eighth and ninth appellants.
CS Wong on watching brief for the tenth appellant.
KS Narayanan (*F Bodipalar* with him) (*Sri Ram & Co*) for the petitioner.

Mahadev Shankar JCA (delivering the judgment of the court): This matter concerns a petition under s 181 of the Companies Act 1965, B
claiming that the affairs of the tenth respondent (in the court below) was being conducted in a manner oppressive to the petitioner. The trial judge dismissed applications by the respondents to the petition to have the petition struck out under O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC'), and directed that there be a full trial. We allowed the appeal C
(see [1996] 1 MLJ 661) but directed that there be further argument on the question of costs if the parties were unable to reach agreement thereon.

Since the parties have not been able to agree, we have had to hear further argument. Basically, each of the appellants wants to be paid a separate set of costs. Counsel for each of the appellants indicated to the D
court that each regards himself entitled to a getting-up fee of at least RM100,000. Respondent's counsel in this appeal submits that there should only be one getting-up fee to be shared by the appellants in such manner as the court may direct.

Leong Hup Holdings Bhd ('Leong Hup') filed a single petition against all ten respondents on 13 February 1995. The next day, Leong E
Hup filed an ex parte summons in chambers to obtain an injunction against all the respondents from holding an extraordinary general meeting which it obtained on 15 February 1995. On 21 February 1995, the first respondent filed a summons to strike out the petition under O 18 r 19 of the RHC. On 27 February 1995, Leong Hup filed an inter partes summons F
in chambers to obtain an injunction and related orders. The other respondents joined forces with the first respondent and also filed summons in chambers to strike out the petition under O18 r 19. They were grouped as follows:

(1) The second, third and fifth filed on 27 February. G
(2) The sixth filed on 28 February.
(3) The seventh on 28 February.
(4) The eighth and ninth on 28 February.
(5) The fourth on 24 February.

H
Each group was represented by a separate set of solicitors but a perusal of the summons in chambers indicates that all of them were urging the same legal grounds for the relief sought. They wanted the ex parte injunction set aside and they wanted the petition struck out.

All the summons in chambers were heard together over a number of I
days. It has to be emphasized here that voluminous affidavits were filed in the court below in support of all the grounds under O 18 r 19(1)(a), (b) and (c) in the application to set aside the injunction. The judgment of the trial judge shows that he was appraised of all this material when the arguments got under way. But in midstream as it were, the respondents in

A the court below stated that they would rest their case solely on the ground that the petition on the face of it did not disclose a reasonable cause of action, ie O 18 r 19(1)(a) alone (see appeal record ('AR') at p 195).

It is clear from the notes of evidence (AR at pp 195–243) that the substantial submissions were made for the respondents in the court below
B by counsel for the first respondent. There was also some significant support from counsel for the second, third and fifth respondents, and somewhat less by counsel for the fourth respondent and the ninth respondent. The rest merely supported these submissions.

After the judge dismissed the application to strike out, all the
C respondents below appealed. The grouping and their respective counsel were as follows:

(1) 218–95: The first respondent was represented by En Cecil Abraham and En RS Nathan.

(2) 219–95: The second, third, and fifth respondents were represented
D by En YM Siew.

(3) 274–95: The fourth respondent was represented by En Augustine Poh.

(4) 245–95: The sixth respondent was represented by En Teh Boon Eng, En N Navaratnam and En P Gananathan.

E (5) 248–95: The seventh respondent was represented by En Jaswinder Singh.

(6) 251–95: The eighth and ninth respondents were represented by En Ghazi Ishak.

The appeals were confined to one issue only: Did the petition on its face
F disclose a cause of action?

Once again, the substantial submission was made by En Abraham. En YM Siew and En Augustine Poh adopted his submission and elaborated upon it. Encik Ghazi Ishak was of some assistance to us as to the non-involvement of the eighth and ninth respondents in the dispute. Encik Teh
G and En Jaswinder Singh merely adopted the submissions of the other three and did not address us at all.

It should be immediately apparent that it would be iniquitous for us to permit the same measure of fees for getting-up and advocacy to all counsel in each of the six appeals. With the greatest respect to all concerned,
H much of what was said after En Abraham completed his address was only a repetition of the same legal principles with different cadences.

Our attention was directed to the passage at The Supreme Court Practice (1995) Vol 1 para 63/3/2 which is the equivalent of our O 59 r 3, and the relevant statements in *Ritter v Godfrey* [1920] 2 KB 47, *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 at p 821 and *Lim Heng Hoo v*
I *Tan Hock Hai & Ors* [1976] 2 MLJ 159.

We must confess we did not find these cases particularly helpful. Costs are always a matter of discretion (see r 96 of the Rules of the Court of Appeal 1994 ('the Rules')), and how a discretion is exercised must be governed by the facts of each case.

Rule 55 of the Rules makes the Rules of the High Courts 1980 ('the RHC') applicable for costs in the Court of Appeal. Order 59 r 9(4) of the RHC reads:

> (4) The court in awarding costs to any person may direct that, instead of taxed costs, that person shall be entitled —
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> (a) to a proportion specified in the direction of the taxed costs or to the taxed costs from or up to a stage of the proceedings so specified; or
>
> (b) to a gross sum so specified in lieu of taxed costs.

Encik RS Nathan has pointed out that the preparation of the appeal record was entirely the work of the first respondent's solicitors. The rest of the work done in an appeal falls almost entirely under O 59 Appendix 1, Pt IV item 27. Almost all the cases cited to us were already cited in the court below.

In these circumstances and only so far as this appeal is concerned, we think that the ends of justice will be best served by our exercising our discretion to award a gross sum under O 59 Appendix 1, Pt IV item 27 in lieu of taxed costs for this item as follows:

(1) Appeal 218–95 = RM100,000
(2) Appeal 219–95 = RM40,000
(3) Appeal 274–95 = RM25,000
(4) Appeal 245–95 = RM10,000
(5) Appeal 248–95 = RM10,000
(6) Appeal 251–95 = RM25,000

These costs shall be paid to the appellants by Leong Hup in addition to any other costs they shall be entitled to for *other* work done in this appeal which shall be taxed in the usual manner.

We also order that all the costs in the court below shall be taxed and paid by Leong Hup to each of the respondents. They shall be entitled to present separate bills of costs for taxation but when it comes to O 59 Appendix 1, Pt IV item 26 the registrar should have regard to what we have done here as a guide to how the getting-up fee and advocacy before the trial judge should be inter-related. We do not think it is right that we should make a gross award for the costs in the High Court without giving the parties a reasonable opportunity of clarifying the respective roles they played in the court below where there were other issues which were canvassed other than the single question as to whether the petition disclosed a cause of action. In any event, those costs *should be higher* than what we have awarded here because the efforts would have been more strenuous.

Order accordingly.

Reported by Loo Lai Mee